

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petitions | : | |
| of | : | |
| MORTON STOLL | : | DETERMINATION |
| | : | DTA NOS. 818844 |
| for Revision of Determinations or for Refund of Sales | : | AND 818845 |
| and Use Taxes under Articles 28 and 29 of the Tax Law | : | |
| for the Periods March 1, 1998 through February 28, 1999 | : | |
| and March 1, 2000 through August 31, 2000 and for | : | |
| Redetermination of Deficiencies or for Refund of | : | |
| New York State and New York City Income Taxes under | : | |
| Article 22 of the Tax Law and the New York City | : | |
| Administrative Code for the Years 1997, 1998 and 2000. | : | |

Petitioner, Morton Stoll, 38 Edgewater Lane, South Nyack, New York 10960, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1998 through February 28, 1999 and March 1, 2000 through August 31, 2000 and for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997, 1998 and 2000.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 29, 2003 at 10:30 A.M., with all briefs to be submitted by September 25, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Warren E. Meth, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUES

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of The Lincoln Tavern Management Corp. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is therefore personally liable for the tax, penalty and interest due from such corporation.

II. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to The Lincoln Tavern Management Corp., who willfully failed to do so and is therefore liable for a penalty equal to the amount of unpaid withholding taxes due from such corporation pursuant to Tax Law § 685(g) and (n).

FINDINGS OF FACT

1. On April 2, 2001, the Division of Taxation (“Division”) issued to petitioner, Morton Stoll, six notices of determination which assessed additional sales and use taxes due, plus penalty and interest, as follows:

| Notice No. | Type of Notice | Period | Amount Due |
|-------------|-------------------------|-----------------|---|
| L-019223122 | Estimated Determination | 6/1/00-8/31/00 | \$11,127.26 in tax, plus penalty and interest |
| L-019223123 | Determination | 3/1/00-5/31/00 | \$1,346.47 in penalty and interest |
| L-019223124 | Estimated Determination | 12/1/98-2/28/99 | \$28,752.90 in tax, plus penalty and interest |
| L-019223125 | Determination | 6/1/98-8/31/98 | \$14,729.11 in tax, plus penalty and interest |
| L-019223126 | Estimated Determination | 9/1/98-11/30/98 | \$38,767.71 in tax, plus penalty and interest |

| | | | |
|-------------|---------------|----------------|---|
| L-019223127 | Determination | 3/1/98-5/31/98 | \$17,552.53 in tax, plus penalty and interest |
|-------------|---------------|----------------|---|

2. The notices of determination informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from The Lincoln Tavern Management Corp. and therefore personally liable for the sales and use taxes due from that corporation.

3. Also on April 2, 2001, the Division issued to petitioner four notices of deficiency which assessed penalty due from petitioner pursuant to Tax Law § 685(g) as follows:

| Notice Number | Period Ended | Penalty Assessed |
|---------------|--------------|------------------|
| L-019223128 | 9/30/00 | \$2,705.27 |
| L-019223129 | 12/22/97 | \$2,045.57 |
| L-019223130 | 6/30/98 | \$3,661.80 |
| L-019223131 | 3/31/98 | \$301.99 |

4. The notices of deficiency also informed petitioner that the Division had determined that he was an officer or responsible person of The Lincoln Tavern Management Corp. and therefore subject to a penalty equal to the unpaid withholding taxes due from the corporation pursuant to Tax Law § 685(g). The penalty asserted in the notices of deficiency was premised on the failure of The Lincoln Tavern Management Corp. to remit to the Division withholding taxes as reported for those periods.

5. Commencing in or about late 1994, Lincoln Tavern Management Corp. (“the corporation”) operated a bar and restaurant known as Lincoln Tavern located at 51 West 64th Street in New York City. In or about 1997, the name of the bar and restaurant operated by Lincoln Tavern Management Corp. at 51 West 64th Street was changed to Brasserie Americaine.

The restaurant was operated as the Brasserie Americaine through the balance of the period at issue.

6. The shareholders of Lincoln Tavern Management Corp. were Gerard Renny and Robert Stecher. Petitioner was never a shareholder of Lincoln Tavern Management Corp.

7. Renny and Stecher were also the owners of a corporation called Stepac Corp., which operated a bar and restaurant called Lucky's located at 60 West 57th Street in New York City. Lucky's was located about seven blocks from Lincoln Tavern. Lucky's was in business from about 1993 until 1998 or 1999.

8. Of the two shareholders of Lincoln Tavern Management Corp. and Stepac Corp., Renny was the owner primarily in charge of the operations of the two restaurants. Stecher lived in Florida, and while he was involved in the restaurants, he was not involved on a day-to-day basis.

9. Petitioner began working for Renny and Stecher in or about 1993. He worked first as general manager of Lucky's. He worked at Lucky's until it closed in 1998 or 1999. After Lincoln Tavern opened he also worked as general manager there and as general manager of Brasserie Americaine after the name change.

10. Petitioner worked for both restaurants, as needed, throughout the period of his employment. Renny decided where petitioner would work.

11. As general manager, petitioner oversaw the day-to-day operation of the restaurant, including supervising the waiters and waitresses, bartenders, and cooks. His duties also included supervising other managers and ordering supplies for the restaurant. Petitioner was also responsible for customer relations. Simply put, petitioner's job was to make sure the restaurant ran smoothly.

12. Petitioner could recommend the hiring and firing of employees. Renny had the final word on such matters.

13. Petitioner had authority to sign checks for the corporation. He regularly wrote checks for supplies for day-to-day operations.

14. Petitioner was not involved in the corporation's bookkeeping, record keeping or accounting activities. Petitioner was not involved in the maintenance of any corporate books or records.

15. Petitioner was not involved in the preparation of any of the corporation's tax returns.

16. Petitioner could sign documents on behalf of the corporation, including tax returns, but only on the authorization of Renny. Petitioner did sign corporate tax returns on occasion.

17. Petitioner did not inquire as to whether corporate tax returns were being filed or if the sales and withholding taxes were being paid to New York State.

18. Petitioner was paid about \$30,000.00 annually for his work for The Lincoln Tavern Management Corp. and Stepac Corp.

19. Petitioner conceded that he signed checks on behalf of the corporation payable to "New York State Sales Tax" dated September 25, 1997, October 20, 1997, December 22, 1997, and May 19, 1998. The check dated September 25, 1997 is typewritten except for petitioner's signature and the October 20, 1997 check appears to have been written by another hand and signed by petitioner. The checks dated December 22, 1997 and May 19, 1998 were drafted in their entirety by petitioner. All of these checks were returned for insufficient funds.

20. Pursuant to a standard form Corporate Resolution Authorizing Banking Accounts, Loans and Related Matters, the corporation authorized petitioner, Gerard Renny and Alexis Abella to sign checks with respect to accounts at the Bank of New York, to borrow money from

the Bank of New York, and to engage in other banking-related activities on behalf of the corporation with the Bank of New York. This corporate resolution is dated November 14, 1994 and bears the signatures of Renny as president and Abella as secretary. Petitioner is listed on the resolution as vice-president. His signature is not on the resolution.

21. Petitioner was authorized to sign checks with respect to a corporate checking account at Chase Manhattan Bank. Petitioner is listed as “manager” on the signature card maintained by the bank with respect to that account. Renny and Stecher were also authorized signatories with respect to that account. Renny is listed as vice president and Stecher is listed as president on the signature card maintained by the bank with respect to that account. The Chase Manhattan account was opened in 1996 and closed in 1999.

22. Sales tax returns for the periods ended May 31, 1998 and August 31, 1998 (Form ST-810) purport to be signed by petitioner. The May 31, 1998 return identifies petitioner as “manager.” The August 31, 1998 return identifies petitioner as “vice president.” However, a close comparison of the signatures on such returns with the concededly genuine signatures on the checks in payment of sales tax (*see*, Finding of Fact “19”) compels the conclusion that the signatures on the returns are not that of petitioner.

23. The record also contains a return for the period ended May 31, 2000. This return purports to be signed by Robert Stecher, identified on the return as “owner.”

24. A sales tax return for the period ended February 28, 1995 and dated March 20, 1995 bears the purported signature of a Joseph Renny listed on the return as president. There is no evidence in the record identifying a Joseph Renny.

25. A quarterly combined withholding and wage reporting return (Form NYS-4) dated June 8, 1998 bears a purported signature of petitioner which is in the same hand as the sales tax

returns for the periods ended May 31, 1998 and August 31, 1998 (*see*, Finding of Fact “22”). Such return was thus not signed by petitioner.

26. A quarterly combined withholding and wage reporting return (Form NYS-45) for the period October 13, 2000 through November 15, 2000 bears the signature of an individual identified as a Chapter 11 operating trustee. The return indicates that the corporation filed for bankruptcy under Chapter 11 on May 2, 2000 and that an operating trustee was appointed by court order on October 13, 2000. This return further indicates that the bankruptcy case was dismissed by court order on November 16, 2000.

27. Petitioner met with Division employees when they came to the premises to discuss or investigate the corporation’s tax situation. There is no evidence in the record that petitioner attempted to resolve the corporation’s tax problems or that he held himself out as a person responsible for the corporation’s taxes. No Division employees testified at the hearing.

28. The date of petitioner’s separation from the corporation is not in the record.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect sales tax under Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. Tax Law § 685(g) imposes upon any person required to collect, truthfully account for and pay over withholding taxes who willfully fails to collect and pay over such taxes, “a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.” Tax Law § 685(n) defines “person,” for purposes of Tax Law § 685(g), to include, among others,

corporate officers and employees who are under a duty “to perform the act in respect of which the violation occurs.” Whether someone is a “person” under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (*see, Matter of Picciurro*, Tax Appeals Tribunal, August 11, 1994; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

C. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated :

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation [citations omitted] (*Matter of Constantino, supra*).

D. The record in this case indicates that petitioner was not a responsible officer of the corporation. It is true that petitioner signed checks, including checks in payment of sales taxes, and tax returns on behalf of the corporation. Additionally, petitioner’s name appears, as vice president, on the Corporate Resolution Authorizing Banking Accounts, Loans and Related Matters with respect to the Bank of New York. However, these factors, which at face value

might place petitioner in a position of one under a duty to collect and remit taxes, must be weighed in consideration of the overall circumstances of the ownership, control, and actual operation of the corporation.

First, petitioner made no investment of his own in the corporation. He was not a shareholder. He did not loan money to the corporation. He was not a director of the corporation. While he may have been, nominally, an officer of the corporation,¹ his relationship with the corporation was that of a supervising employee, and his only “stake” in the corporation was his continuing receipt of his modest salary (*see*, Finding of Fact “18”). As general manager, petitioner oversaw the restaurant’s day-to-day operations, including supervising the waiters and waitresses, bartenders, cooks, and other managers. He was responsible to order supplies for the restaurant and was also responsible for customer relations. The record establishes, however, that the corporation was controlled by Renny. Renny determined where petitioner worked, i.e., at Lucky’s or Lincoln Tavern (later the Brasserie Americaine). Renny made decisions on the hiring and firing of employees. Petitioner could sign documents on behalf of the corporation, including tax returns, but only on the authorization of Renny. Accounting, bookkeeping, record keeping and the preparation of tax returns were outside the scope of petitioner’s duties. Given the fact of Renny’s control, this is not a case where petitioner could have acted but chose not to (*cf.*, *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027). Petitioner was thus not in a position to be held properly responsible to collect and remit either sales and use taxes or withholding taxes on behalf of the corporation during the relevant period.

¹ The record is unclear as to whether petitioner was aware that certain documents indicated that he was vice president. Specifically, the corporate resolution does not bear his signature (*see*, Finding of Fact “20”) and the tax return which indicates that he was vice president was not signed by him (*see*, Finding of Fact “22”).

The Division asserted that petitioner's testimony was not credible, contending that he was evasive and belligerent in his responses on cross-examination. It is true that petitioner was reluctant to respond to certain questions and did become antagonistic toward the Division's representative during the cross-examination. While his demeanor may not have been helpful to his case, his testimony, as corroborated by the testimony of Richard Mancini, a former manager at Lucky's and Lincoln Tavern, and Frank Graziadei, the former attorney for the corporations, was credible on the point of petitioner's role in the operation of the restaurants and Renny's control over the restaurants.

In many ways, petitioner's case is stronger than that of the petitioner in *Matter of Constantino (supra)* where the Tax Appeals Tribunal upheld an administrative law judge determination that the petitioner was not a responsible officer. In *Constantino* and in the instant matter, the petitioners were supervising employees with nominal officer title who had check-signing authority which was regularly exercised. Additionally, in both cases, the corporations were controlled by a majority shareholder. In contrast to the instant matter, however, the petitioner in *Constantino* was a shareholder and investor in the corporation who could hire and fire employees. Here, as noted above, petitioner was neither an investor nor a shareholder and could only recommend hiring and firing.

This case is also distinguishable from *Matter of Kropf* (Tax Appeals Tribunal, March 21, 1991) where the petitioner was determined to be a responsible officer, notwithstanding that, like petitioner herein, he was neither a shareholder nor an investor in the corporation. In *Kropf* the record showed that the petitioner participated in authorizing the corporation to borrow funds and attempted to resolve the corporation's sales tax problems by executing a deferred payment agreement with the Division. The petitioner in *Kropf* thus had broad authority over the financial

affairs of the corporation. In contrast, the record in this case shows that petitioner's authority was limited and did not extend to the corporation's financial affairs. Although petitioner did meet with Division employees when they appeared at the restaurant (*see*, Finding of Fact "27"), the record does not show that petitioner attempted to resolve the matter like the petitioner in *Kropf*, or that he even held himself out as someone with authority to resolve the matter.

Additionally, although the standard form Corporate Resolution Authorizing Banking Accounts, Loans and Related Matters authorizes petitioner, along with Renny and Alexia Abella, to borrow money from the Bank of New York, and to engage in other banking-related activities on behalf of the corporation with the Bank of New York (*see*, Finding of Fact "20"), petitioner did not engage in any such activities and the record is clear that, given Renny's control over corporate affairs, petitioner did not have actual authority to engage in such activities.

E. The petition of Morton Stoll is granted and the notices of determination and notices of deficiency dated April 2, 2001 are canceled.

DATED: Troy, New York
March 11, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE